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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. TIMOTHY D. DELOSREYES, Defendant and Appellant.	A137119 (Contra Costa County Super. Ct. No. 051006220)

A jury found appellant Timothy Delosreyes, III, competent to stand trial and convicted him of first degree murder (Pen. Code, [1]§ 187), torture (§ 206), first degree residential burglary (§§ 459, 460, subd. (a)), and grand theft of a firearm (§ 487, subd. (d)(2)). The trial court sentenced appellant to state prison for 25 years to life, plus a two-year consecutive term. On appeal, he raises numerous claims of error with respect to the proceedings at both the competency and guilt phases, as well as sentencing error and ineffective assistance of counsel. We affirm.

[1] All further undesignated statutory references are to the Penal Code.

I. PROCEDURAL HISTORY

By information filed on June 14, 2010, appellant was jointly charged with his father, Timothy Delosreyes, Jr., and Robert Gardner.[2] On July 22, 2010, appellant's trial was severed from that of his co-defendants.

On May 4, 2011, criminal proceedings were suspended under section 1368 for the purpose of evaluating appellant's trial competence. A jury trial on that question commenced on April 23, 2012. On April 26, 2012, the jury returned a verdict finding appellant competent to stand trial. A defense motion for a judgment notwithstanding the verdict was heard and denied on April 27, 2012.

On September 6, 2012, jury trial commenced as to guilt. On September 20, 2010, the jury found appellant guilty as charged.

On October 19, 2012, appellant was sentenced to state prison. This appeal timely followed.

II. EVIDENCE AT TRIAL

A. Competency Phase

1. Defense Case

On or about April 2011, psychologist John Kincaid, Ph.D., first met appellant. He examined appellant on three occasions.

In his initial meeting with Dr. Kincaid, appellant reported that he had been on "pills" since the age of two, and that he had a history of "severe" Attention Deficit Hyperactivity Disorder (ADHD). Appellant described his use of stimulants, such as methamphetamine, to control auditory hallucinations. It appeared to Dr. Kincaid that appellant suffered hallucinations and "had a long history of severe mental disorder going back for many, many years, probably with the onset in his early teens."

After the first assessment, Dr. Kincaid contacted appellant's mother and grandmother, and obtained records from the Contra Costa County Health Department, as well as his medical records from the jail and county hospital dating back to his arrest.

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[2] In a published opinion, we affirmed the judgment in co-defendant Robert Gardner's case. (*People v. Gardner* (2014) 231 Cal.App.4th 945.)

Appellant had been a severely emotionally disabled student and had attended special schools. He went to a developmental preschool and was identified at an early age as having a range of emotional and behavioral problems. He had seen a number of clinicians over the years. He was expelled from several schools.

Prior diagnoses of appellant ranged from mood disorder to schizoaffective disorder, and the most recent diagnosis was "psychosis, not otherwise specified." His grandmother reported that when "he hit puberty, he really went nuts."

During Dr. Kincaid's second evaluation of appellant in May 2011, he administered a standardized assessment called the "Competency Assessment Instrument." The Competency Assessment Instrument breaks down competence for trial into various subparts. Appellant's scores on some items indicated "sort of competent or probably incompetent," and "on more of them, incompetent." As a result, Dr. Kincaid concluded that appellant was "not competent to stand trial at that time." Dr. Kincaid had considered that appellant "might be competent and just kind of a criminal guy who grew up in that culture." However, as to his mental issues, appellant "wasn't malingering" and "wasn't faking."

Dr. Kincaid described appellant's ability to cooperate with counsel as being "highly variable," in part, because appellant expressed fear about whether he could trust his attorney. Appellant knew that he faced a murder charge, but he was "very vague" about "the rest." Appellant believed the prosecutor's job was to help him, that the judge was there to try to convict him, and that his own attorney had authority over him. He had "no clue" about the jury or witnesses.

Appellant tried to hide his mental illness because his father's family did not approve. He had not wanted to go to a hospital because his family was against it. Dr. Kincaid had heard from relatives that appellant's father and the paternal side of the family would interfere with appellant's treatment and that appellant would stop taking his medication when he lived with his father. Appellant was embarrassed by his mental problems and would repeatedly apologize for having heard voices.

Dr. Kincaid deemed appellant's problems to be chronic. It was clear to Dr. Kincaid that appellant was not malingering based on his long history of severe mental disorder, hallucinations, paranoia, and ADHD.

Dr. Kincaid's third and most recent evaluation of appellant occurred in April 2012, the week before the competency trial. Dr. Kincaid readministered the Competency Assessment Instrument, and found that there was a "slow but significant deterioration in [appellant's] mental status." It appeared that his visual hallucinations were not as severe, but his auditory hallucinations were more consistent. He would hear "mumbling" in the background and cursing in a loud, angry voice, which were experiences he also had as a child. Accordingly to Dr. Kincaid, it would take an "academy award actor" to malinger over more than a year.

Dr. Kincaid opined that in some areas of competency, appellant "can do all right." However, in other areas, Dr. Kincaid believed that appellant had "no idea what goes on, who the players are, and what they mean in trial." Dr. Kincaid opined that it would be difficult for him to cooperate with his attorney.

Appellant was vague in understanding about his charges: "somebody died, so I'm in trouble." He thought murder was a misdemeanor. When questioned about crimes and sentences, he was "very garbled." Dr. Kincaid was also unsure whether appellant would be able to give a coherent account of what had happened.

Dr. Kincaid became convinced that appellant was distracted not merely by ADHD but by a psychosis that involved hallucinations. He explained that psychosis results in "cognitive intrusion," where memory is retained but cannot be accessed.

Dr. Kincaid knew that prosecution witness, Marlin Griffith, Ph.D., disagreed with his conclusion regarding appellant's trial competence. Dr. Griffith had found that appellant was "currently. . . having hallucinations" and suffered from a mood disorder and a psychotic disorder. Dr. Kincaid understood Dr. Griffith's point that appellant "does not present with an acute psychiatric disorder," because he was being treated and was "not as out of control as he might be" without treatment. However, Dr. Kincaid did not agree that appellant had no acute mental disorder because his symptoms continued.

On cross-examination, Dr. Kincaid acknowledged that appellant's grandmother indicated in a letter that appellant "lies, cheats and steals." That "[t]he older he gets, the more the lies become fluent[.]" Appellant's grandmother further described appellant as a "chameleon[,]" who adapts "to each situation, slash, experience, slash, event[.]" Dr. Kincaid also acknowledged that during one of his meetings with appellant, appellant told Dr. Kincaid "he was there for murder" and went on to elaborate that "he was just an accessory[.]" Appellant also told Dr. Kincaid "that the victim was not supposed to die, just to scare him," and that appellant would "take 10, 15, 20 . . . flat, regarding going to jail for the case[.]"

Although Dr. Kincaid testified that appellant had a history of having hallucinations, he acknowledged that a mental health report dated April 2, 2010, noted that appellant "does not have any hallucinations or delusional thoughts[,]" and that "his thought process is logical and goal directed[.]"

Dr. Kincaid ultimately concluded it would be very difficult for appellant to cooperate with counsel; that he is "not consistently competent to stand trial."

2. Prosecution's Case

a. Police Investigation

Contra Costa County Sheriff's Deputy Michael Meth had interviewed appellant on December 30, 2009 at the police station; appellant initially stated he did not know anything about the death of Eric Bean. Later, appellant reported that Eric had "burned" some people and he indicated that he might know who the killers were. At some point during the interview, appellant asked to use the restroom. In the restroom, he told Deputy Meth that "Christopher Roberts" and "Mario" killed the victim. When Deputy Meth asked appellant follow-up questions, appellant "claimed he was having chest pains and that he didn't feel well." Based on appellant's symptoms, Deputy Meth called an ambulance.

On March 6, 2010, Contra Costa County Sergeant Garrett Schiro interviewed appellant; within a few minutes of being read his *Miranda*[3] rights, appellant asked to use the restroom. After returning to the interview room, appellant stated he accidentally swallowed the lid of a water bottle the officers had given him. A short time later, appellant indicated that the "lid was starting to bother him[.]" An ambulance was called, and appellant was taken to the hospital.

When the interview continued at the hospital later on March 6, 2010, Sergeant Schiro showed appellant a video segment of codefendant Robert Gardner's interrogation. In response, appellant said: "He's a fucking piece of shit blood, a fucking liar. The fucking dude was setting me up." After being told the crime lab was analyzing his bedroom, appellant stated, "I was so methed out." When told the crime lab had found Eric's blood in his bedroom, appellant said he and Eric had both been "methed out" at that time. Later during the interview, appellant admitted helping place Eric's body on the side of the road.

During a subsequent interview conducted on March 8, 2010, appellant said that he was "too young to go down for this." When shown a video recording of his father's statement, appellant said, "he's a liar" or "he's lying." When asked whether his DNA would be on Eric's body, appellant said it would because he touched Eric after he was dead. When asked whether his DNA would be on a rope or tape, appellant said he had removed the items after he was dead. Later, appellant said he had punched Eric in the face. When asked if he had kicked Eric, appellant said he just "scooted him with his foot."

At some point during the interview, appellant asked if the interview was being recorded. When he was told it was, he "immediately . . . started becoming emotional." At the end of the interrogation, when asked if he had participated in the killing, appellant said, " 'Yes. Yes, I guess I did. I didn't want him to die.' " He also stated: " 'I didn't do it, I didn't kill . . . my friend. [¶] I can't go down for this.' "

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[3] *Miranda v. Arizona* (1966) 384 U.S. 436.

b. Psychological Evaluation

On July 16, 2011, Dr. Griffith evaluated appellant. As part of his evaluation, Dr. Griffith reviewed appellant's psychosocial history with appellant, and also reviewed the information filed by the district attorney, the probation report, and appellant's mental health records obtained from the jail. Dr. Griffith noted that a notation on the jail chart dated July 6, 2011, indicated that appellant "was doing okay, but complaining of ongoing anxiety. No current voices or other concerns were indicated." However, the chart notes and comments in the jail records indicated a past history of hallucinations. During the interview, appellant's speech was clear. Appellant exhibited "no bizarre thoughts[,]" and the information he gave Dr. Griffith "was fairly straightforward with a clear understanding of . . . his intentions and his goals."

When Dr. Griffith used his own personal, two-page competency assessment instrument to check appellant's "concentration and attention," appellant "made a mistake[.]" As to whether he believed appellant's inability to complete the task given was intentional, Dr. Griffith opined that appellant "was not motivated to respond to that particular task, and at that point I guess I began to question his motivation for the evaluation, the outcome of the evaluation." When asked "what he was charged with" appellant told Dr. Griffith, " 'Murder.' . . . 'I think other things, but I don't know them.' " As to appellant's statement that the likely penalty for murder would be a " 'couple of years if found guilty[,]' " Dr. Griffith noted that he believed appellant's statement was odd. "I think just normal street knowledge, one would not think if you were found guilty of murder you would [only] get a couple of years. It struck me as Mr. Delosreyes not being fully cooperative with the evaluation."

Dr. Griffith reviewed a psychiatric consultation report from April 2, 2010, that indicated "no comments of hallucinations were reported" by appellant. Nor did the report indicate that appellant had reported a history of hallucinations or delusional thoughts.

Dr. Griffith did not contact members of appellant's family. He did not review appellant's juvenile records or his school records.

Dr. Griffith testified that appellant was competent to stand trial when he was examined in 2011. On cross-examination, Dr. Griffith admitted that he had no basis for judging appellant's current mental competence.

B. Guilt Phase

1. Residential Burglary, Gun Theft, and Murder

On December 17, 2009, three shotguns and a pistol were taken from Jim Bean's home safe in Martinez. The door to the safe looked like it had been pried open. Two of the latent fingerprints found on the door were identified as belonging to Jim Bean's 18-year-old son Eric, and two others were identified as belonging to Robert Gardner. Jim Bean testified that he never gave appellant or codefendant Gardner permission to be in his house on December 17, 2009.

Four days later, on the morning of December 21, 2009, Eric Bean's body was found against a barbed wire fence on McEwen Road, just north of Highway 4 in Contra Costa County. His body was in rigor mortis, indicating that he had been dead for several hours. It appeared that Eric had been tied and beaten; his wrists, ankles, and neck bore ligature marks and there were many lacerations, abrasions, and contusions about his face and head. Yellow fibers were collected on McEwen Road. Eric's t-shirt was blood stained, though no blood was found on the ground, suggesting that he had been murdered at another location. It was later determined that Eric had been murdered at 100 Carolina Drive in Benicia, the known residence of appellant and his father, codefendant Timothy Delosreyes, Jr.

2. Forensic Evidence

On December 23, 2009, forensic pathologist Arnold Josselson, M.D., performed an autopsy on Eric's body. The autopsy revealed that Eric had abrasions and "a lot of bruises[,]" on the surface of his skin. One of Eric's front teeth was chipped, and there were marks on his ankle and wrists consistent with ligatures. An examination of Eric's internal injuries revealed bleeding over the entire undersurface of his scalp due to blunt force injury; the surface of his brain also showed bleeding. Eric had also suffered injuries due to strangulation, including hemorrhages in his neck, hyoid bone, and voice box.

Blood was found in his airway, stomach, and lungs, indicating he had breathed in and swallowed blood before he died.

The cause of Eric's death was determined to be "strangulation and blunt force head injury." When tested, Eric's blood showed no presence of alcohol; it did test positive, however, for a low level of methamphetamine. A test of his urine revealed THC, a common by-product of marijuana. Dr. Josselson opined that it would have taken about ten to twenty seconds for Eric to lose consciousness when he was strangled, but that "the pressure has to be applied continuously for about four or five minutes before you actually die." He also explained that the blunt force trauma suffered by Eric would have been painful. If someone suffered blunt force injuries like the ones suffered by Eric, he could have been unconscious for several hours or he could have died rapidly. During the autopsy, three blue fibers were collected from Eric's boxer shorts, and a yellow fiber was collected from the back of his leg.

On March 6, 2010, investigators went to the three-bedroom house at 100 Carolina Drive in Benicia. Blood was found on a corner wall in the northeast bedroom. The DNA profile from the blood matched that of Eric Bean.

On March 9, 2010, a white pick-up truck was examined, and a yellow rope was attached to a "tie down" in the bed. Areas of the bed tested positive for blood.

Sergeant Schiro testified that he spoke with Dr. Josselson sometime in May 2010, and asked him about throat injuries Eric had suffered prior to his death. The doctor stated that those injuries were consistent with injuries "that a sword or dagger going down someone's throat would . . . make." Sergeant Schiro first learned about the possible use of a knife when interviewing one of appellant's codefendants in March 2010; as such, he did not alert Dr. Josselson about this possibility when the autopsy was performed in December 2009.

3. Testimony of Appellant's Father and Co-Defendant

In December 2009, Timothy Delosreyes, Jr. ("Junior"), was living at 100 Carolina Drive in Benicia with his girlfriend and their one-year old son. Appellant, who was Junior's 18-year-old son, also lived at the residence. Junior had prior convictions for

misdemeanor vehicle theft, possession of methamphetamine for sale, and being a felon in possession of a firearm (twice). Junior had been charged with Eric's murder, and he accepted an offer of sixteen years in prison in exchange for his testimony at appellant's trial.

Junior had been friends with co-defendant Robert Gardner for about ten years; he also was friends with Gardner's wife, Melody Rives. Gardner and Rives also lived in Benicia, just a few miles away from Junior. Junior knew Eric since the time Eric and appellant had been in junior high school.

A few days before Eric's murder, Junior came home after he had been gone on a four-day drinking binge and found Gardner, Rives, appellant, and Eric on the back patio. They were drinking and partying, which "caught" Junior's "attention." Eventually, Junior and Gardner left the party and went to Vallejo, "looking for crank." Junior and Gardner spent the night at a friend's house. In the morning, Gardner woke him up and told him that they had to leave and go back to Junior's house in Benicia.

Upon arrival at the Carolina house in Benicia, Gardner parked his truck in front of the house and he went inside; Junior stayed outside on the porch. While he was outside, Rives drove up and Gardner came back outside. The three of them went inside the house. Junior saw appellant in the living room, but he did not see Eric.

Junior could tell that appellant was high on methamphetamine. He heard appellant tell Gardner: "He [Eric] was going to tell on us." Gardner told appellant: "We got to make sure he can't [ ] get away. Go get some red tape." Gardner indicated that they were "just going to scare him[;]" Gardner and appellant took the tape into appellant's bedroom to tie up Eric.

They were in the bedroom for just a "few minutes." When they returned to the living room, appellant asked: "What are we going to do?" Either appellant or Gardner re-entered the bedroom, while Junior and Rives went to the backyard to smoke.

After hearing banging noises in the house, Junior went back inside to find appellant at the bedroom door and Gardner coming out of the bedroom. Junior asked

what was "going on," Gardner answered: " 'I just knocked him out.' " Appellant closed the bedroom door, and they all went out to the rear patio.

Outside on the patio, appellant said: "I ain't going to jail." Gardner said Eric could "tell" about the guns stolen from his father's house while appellant acted as "lookout man." Appellant and Gardner went back inside the house.

Junior could hear "thumping" and "scuffling" noises from the bedroom. He entered the bedroom to find Gardner on top of Eric as if he had just beaten him. Junior saw that Eric was injured, and that he had his hands tied in front of him. Junior saw a rope, but did not see it around Eric's neck.

The men sat in the living room talking. Appellant and Gardner thought they would scare Eric. At some point, Gardner said: " 'We got to make sure we tie him up better so he won't get away.' " Gardner also said: " 'We can't let him go now because now we'll get in trouble for kidnapping.' " Appellant and Gardner went in the bedroom and began yelling at Eric; Junior went into his own bedroom.

Junior was in the shower when he heard yelling and "thumping." Junior got out of the shower and told appellant and Gardner to "[s]hut him up." Appellant hit Eric once in the head, and Gardner also hit him. Junior returned to his room and got dressed.

Before leaving the house, Junior checked on Eric, who was still alive. Junior told Eric: "Let them know what they want to hear. That you're not going to tell on them." Eric, whose hands and feet were tied, nodded his head.

Appellant was also in that bedroom, and he and Junior "got into it a little bit." When Junior left the house at approximately 1:00 p.m., Eric was conscious.

Junior returned to his house at approximately 11:00 p.m. to discover appellant, Rives, and Gardner present. Gardner and appellant had an argument a month later. Appellant then said, " 'I stabbed him for you guys.' "

4. The Testimony of Co-Defendant Gardner's Wife

Melanie Rives testified that she had last used methamphetamine on March 4, 2010, a couple days before she was arrested for Eric's murder. At the time of trial, the murder charge against her was still pending. She had remained in custody until she

testified the first time. Her agreement was that she would plead to an accessory charge and receive no more than one year in county jail.

In December 2009, Rives and Gardner were living in Benicia. Rives had met appellant while doing landscape work in Napa. She would "socialize" at the Delosreyes house on Carolina Drive in Benicia.

Rives met Eric four or five days before he died, when appellant called and asked her to pick them up at the Amtrak station in Martinez. She picked them up and took them to the Carolina Drive house in Benicia. Appellant and Eric had methamphetamine, and they were "pretty high" that whole week. Rives was "partying" all week, and "everybody" was drinking.

On December 17, 2009, Rives was at the house on Carolina Drive, when appellant came home carrying a shotgun in a blanket, saying: " 'Look at what I got.' " Rives also saw other guns, including a World War II pistol. Eric followed appellant into the house; Gardner stayed outside in the truck.

Two days later on December 19, 2009, at about 8:30 p.m., Rives went for a walk around the Carolina Drive neighborhood with appellant and Eric. During the walk, appellant took a "homemade shank," or a steel rod filed to a point, and stabbed an inflated snowman in a nearby yard.

When they returned to the house, they found that Gardner and Junior had left. Eric and appellant were smoking methamphetamine in appellant's bedroom. Rives fell asleep on the couch at about 5:00 a.m.

At approximately 6:30 a.m., appellant woke Rives and brought her to his bedroom where Eric was in bed covered by a comforter. Appellant pulled the blanket back, and Rives could see that Eric's feet were "zip tied." Eric said, " 'I want to have some coffee,' " and appellant said "okay" and he made coffee for all three of them.

Appellant told Rives that Eric wanted to talk to her. Appellant referred to Eric as a "snitch." Eric had not appeared "concerned" while he drank coffee with Rives and appellant, and she thought they were playing some kind of game to "teach [him] something." After they finished the coffee, Eric returned to the bedroom and laid down.

Rives drove around looking for Gardner or Junior, but could not find either of them. She returned to the house on Carolina Street at 8:00 or 8:30 a.m., finding Gardner and Junior outside. Rives saw Junior enter appellant's bedroom; appellant was already in the room.

Rives went outside to work in the garden. From the garden, she heard what sounded like furniture being moved. She never heard human noises or calls for help. Eventually, Rives went back inside the house, to find Gardner, Junior, and appellant.

Things seemed "normal," but when she walked down the hall, appellant closed his bedroom door. Gardner went out for sandwiches, and they ate lunch. Appellant later came out of the bedroom saying that Eric had eaten a sandwich.

Appellant came from the back porch area carrying yellow or blue rope. When Junior finished his shower and walked past appellant's bedroom, he yelled through the door to "shut him up."

At some point, Rives went to Vallejo and came back to the Carolina Street house at 5:00 or 5:30 p.m. Junior was on his way out. As Rives sat down in the living room, she realized "everything was bad." Later, she heard appellant say "he put the dagger down his throat." Appellant asked Rives, "why he would make a gurgling noise." That night, around midnight, Gardner and appellant left the house and were gone for an hour. When they returned, appellant said they had gone to "county land between Martinez and Crockett," where appellant had unloaded "him" from the truck. Appellant brought a phone book from the bedroom and asked Rives to burn it in the fireplace.

The next day Rives saw bloody clothing in garbage bags in the garage. She cleaned up a blood spot on the bathroom door and spots on the bed. Junior left but returned with bleach, and appellant and Gardner went into the bedroom to clean with the bleach. Appellant later said he stabbed him "for us."

Rives described appellant's demeanor after Eric's death as "[h]appy[;]" she also testified that appellant referred to Eric as " 'Casper.' " After the murder, appellant lived with Rives and Gardner for about two weeks; while appellant was waiting outside for his

father to come get him, Rives saw appellant "walking down the walkway there hitting the garage" and saying " 'I stabbed him for you'[.]"

5. Appellant's Statements to the Police

When appellant was contacted by police on December 30, 2009, he told them that he and Eric had known each other since they were children, and they had reconnected on December 18, 2009, after losing contact. Appellant told police he had nothing to do with Eric's death, and that the person responsible was from Martinez. When appellant was interviewed by police on the afternoon of March 6, 2010, and shown a video of Robert Gardner leading police on a walk-through of the house where Eric was killed, appellant admitted coming home and seeing Eric's dead body. Appellant also admitted loading the body in a truck with Gardner, and driving with him to dump the body "[o]n the road."

During a police interview conducted on March 8, 2010, appellant told police that, "Someone went and robbed his guns—I don't know who—and something went bad and thought he was a snitch." Appellant also told police he had to leave the room because, "He just kept yelling." When asked if appellant had brought the stolen guns home, appellant said, "It wasn't just me. It wasn't just me."

Towards the end of the interview, appellant admitted using his fist to hit Eric in the face, telling police he hurt his hand as a result of the punch. After appellant hit Eric, he "shut up[.]" Appellant also admitted "scoot[ing]" Eric with his foot. When asked how Eric died, appellant said, "I don't know, I think he got beat[.]"

III. COMPENTENCY PHASE ISSUES

A. Jury Instruction Regarding Consequences of Incompetency Finding

Appellant argues that the trial court prejudicially erred in refusing his request to instruct the jury regarding the consequences of finding appellant incompetent. Appellant argues that jury should have been advised that a finding of incompetence was not a " 'get out of jail free' card[.]"

The basis for appellant's argument that an instruction must be given on the consequences of a verdict of incompetency is analogous to cases in which the defendant has pleaded not guilty by reason of insanity. In such cases, it is well established that the

defendant is entitled to an instruction on the consequences of a verdict of not guilty by reason of insanity, because otherwise the jury might assume that the defendant would be freed if he or she was found insane. (CALCRIM No. 3450; *People v. Moore* (1985) 166 Cal.App.3d 540, 554.) Appellant asserts that the same reasoning applies in a competency trial, because jurors will likewise be hesitant to render a verdict of incompetency on the assumption that the verdict will result in the defendant's escape from prosecution and return to the community.

Appellant acknowledges that the California Supreme Court has ruled that an instruction on the consequences of a verdict of incompetency is not required. In *People v. Dunkle* (2005) 36 Cal.4th 861, 896, our high court rejected a similar argument.[4] The defendant in *Dunkle* sought to inform the jury, through the testimony of the defense experts, about what would happen if the defendant was found incompetent to stand trial. (*People v. Dunkle, supra,* 36 Cal.4th at p. 896) However, the trial court instructed the jurors not to consider the potential outcome of their verdict. (*Ibid*.)

On appeal, the defendant in *Dunkle* argued that the trial court erred in failing to instruct the jury on the consequences of a verdict of incompetency, based on the ruling in *People v. Moore, supra,* 166 Cal.App.3d at page 554, that an instruction must be given regarding the consequences of a verdict of insanity. (*People v. Dunkle, supra,* 36 Cal.4th at p. 897.) Our Supreme Court rejected this argument, ruling that "[b]ecause the outcome of any future efforts at restoring a defendant to competency is uncertain at the time when the jury must make its decision on competency, an instruction patterned after *Moore* and CALJIC No. 4.01 is necessarily speculative." (*Ibid.*; see also *People v. Marks* (2003) 31 Cal.4th 197, 217 [same].) Additionally, our Supreme Court declined to apply *Moore* "outside its original context." (*People v. Dunkle, supra,* 36 Cal.4th at p. 897; *People v. Marks, supra,* 31 Cal.4th at p. 217.)

Appellant urges this court not to follow *Dunkle* and *Marks* because those cases are distinguishable from the case at bar. Here, appellant explains, the jurors expressed

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[4] *People v. Dunkle, supra,* 36 Cal.4th 816 was overruled, in part, on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, footnote 22.

concern about the consequences of a verdict of incompetency during voir dire. The jury selection transcript reflects the following questions and comments by one of the prospective jurors:

"[DEFENSE COUNSEL]: Okay . . . [Y]ou indicated that you have some skepticism regarding mental health issues. Elaborate on that little bit?

"PROSPECTIVE JUROR: I do watch the news, and I just unfortunately it's bad thing, but I'm kind of cynical, skeptical. That's my nature of things. Question and doubt in a lot of cases. And it's just my initial thought is it's that first step or extra step to try to avoid charges basically. That's my—that's my initial interpretation of what it is.

"[DEFENSE COUNSEL]: You already know from what you've heard so far that we have two mental health professionals in this case that came to conclusions?

"PROSPECTIVE JUROR: Uh-huh.

"[DEFENSE COUNSEL]: Would you be skeptical about both of them, or just one?

"PROSPECTIVE JUROR: I probably [would] be more skeptical of yours."

We recognize appellant's concern that the jurors in the present case may have considered the consequences of a verdict of incompetency in reaching their verdict in the competency trial. However, as an intermediate court, we are required to follow the decisions in *Dunkle* and *Marks* and therefore we reject appellant's contention that an instruction must be given on the consequences of a verdict of incompetency. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

In any event, even assuming that such an instruction was required, we would find the trial court's error in refusing to give the instruction to be harmless. As stated in *Marks*, "because the proposed instruction is not constitutionally based, its erroneous omission does not warrant reversal unless a different result would have been reasonably probable . . . ." (*People v. Marks, supra,* 31 Cal.4th at p. 222.) As we shall explain *post*, the evidence pointed convincingly to appellant's competency to stand trial. Therefore, it is not reasonably probable that giving the requested instruction would have resulted in a verdict of incompetency.

For these reasons, we conclude that appellant's claim of instructional error lacks merit.

B. Prosecutorial Misconduct

Appellant contends that the prosecutor engaged in a pattern of misconduct that requires a reversal of the competency finding. According to appellant, the misconduct "began during opening statements, continued during presentation of evidence, and came to a crescendo in argument." Appellant claims that the prosecutor's conduct undermined his right to "a reasoned and dispassionate evaluation of the evidence, in violation of the Sixth and Fourteenth Amendments."

1. Legal Standard

The California Supreme Court has explained that, " ' " '[a] prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " [Citation.]' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 819.) The defendant need not show that the prosecutor acted in bad faith. (*Id.* at p. 822.)

Our high court has also observed that " ' " 'a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to *fair comment* on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] . . .' " ' . . . [¶] Prosecutors, however, are held to an elevated standard of conduct . . . because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state. [Citation.]" (*People v. Hill, supra,* 17 Cal.4th at pp. 819-820, italics added.) When a claim of prosecutorial misconduct is based on a prosecutor's questions or comments before the jury, " 'the question is whether there is a reasonable likelihood that the jury construed or applied any

of the complained-of remarks in an objectionable fashion.' [Citations.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1202-1203.)

If we find prosecutorial misconduct that violates a defendant's federal constitutional rights, we must reverse the conviction unless we find beyond a reasonable doubt that prosecutorial misconduct did not contribute to the jury's verdict. (See *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Bolton* (1979) 23 Cal.3d 208, 214.)

Even if prosecutorial misconduct does not rise to the level of rendering a trial unfair under federal constitutional standards, it may still violate state law if it involves the use of deceptive or reprehensible methods to attempt to persuade a jury. (*People v. Valdez* (2004) 32 Cal.4th 73, 122; *People v. Gionis* (1995) 9 Cal.4th 1196, 1215.) When determining whether the prosecutor used deceptive or reprehensible methods to attempt to persuade a jury constituting prosecutorial misconduct, we consider whether a particular incident is incurably prejudicial and warrants a mistrial. This issue is inherently speculative. (*People v. Hines* (1997) 15 Cal.4th 997, 1038; *People v. Gionis, supra,* 9 Cal.4th at p. 1215; *People v. Haskett* (1982) 30 Cal.3d 841, 854.) Prosecutorial misconduct violating state law is reversible if it is reasonably probable that a result more favorable to the defendant would have occurred without the misconduct. (*People v. Bolton, supra,* 23 Cal.3d at p. 214; see *People v. Watson* (1956) 46 Cal.2d 818, 836.)

" '[A] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and *on the same ground*, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety.' [Citation.]" (*People v. Lopez* (2008) 42 Cal.4th 960, 966, italics added.) In all but an unusual case, the prejudicial effect of improperly admitted evidence can be cured by admonishment. (*People v. Prather* (1901) 134 Cal. 436, 439; *People v. Allen* (1978) 77 Cal.App.3d 924, 935.) The California Supreme Court has repeatedly held that in order to preserve an issue of prosecutorial misconduct for review on appeal, the defendant must make a timely objection and request an admonition from the trial court. (*People v. Valdez, supra,* 32 Cal.4th at p. 122; *People v. Cox* (2003) 30 Cal.4th 916, 952 overruled

on another point in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22; *People v. Earp* (1999) 20 Cal.4th 826, 858-859; see *People v. Sapp* (2003) 31 Cal.4th 240, 279.) This requirement allows the trial court an opportunity to correct any error. (*People v. Cox, supra,* 30 Cal.4th at p. 952.)

If the defense fails to request an admonishment, the right to appeal the issue is waived. (*People v. Earp, supra,* 20 Cal.4th at p. 858.) This waiver rule does not apply if a timely objection or request for admonition would have been futile. (*People v. Valdez, supra,* 32 Cal.4th at p. 122; *People v. Hill, supra,* 17 Cal.4th at p. 820; *People v. Johnson* (2004) 119 Cal.App.4th 976, 984.) If the defendant raises this claim on appeal, we may review the prosecutorial misconduct claim only if an admonition would not have cured the harm caused by the alleged misconduct. (See *People v. Valdez, supra,* 32 Cal.4th at p. 122.)

2. Comment During Opening Statement

Appellant contends that the prosecutor committed misconduct during opening statement when he intentionally and egregiously told the jury that appellant had previously been "represented by other counsel who had held no doubt regarding his competence to stand trial." According to appellant, the prosecutor committed misconduct by first trying "to become his own witness" and then by attempting to "make [his] original counsel a witness for the prosecution on the issue of incompetence[.]" The challenged comment arose in the following context:

"[PROSECUTOR]: On June 1st of 2010 a preliminary hearing was heard in this case. What a preliminary hearing is, is that—

"[DEFENSE COUNSEL]: Your Honor, I'm going to object again. We're way off the issues here.

"THE COURT: Sustained. I appreciate the background. May have some relevance as to your theory of the case, but it's really important that the jury not be—this has to be focused on the issue, and the issue is, is the gentleman competent now, 2012. So I don't think we need to know what a preliminary hearing is.

"If you think there's something that you need to mention briefly about what happened, go ahead, but I urge you to focus on competency at this time.

"[PROSECUTOR]: The defendant at the preliminary hearing was represented by a different attorney. That different attorney, or those attorneys afterwards, never expressed any doubt as to Mr. Delosreyes.

"[DEFENSE COUNSEL]: Your Honor, object to this.

"[PROSECUTOR]: May we approach?

"[DEFENSE COUNSEL]: Totally inappropriate.

"THE COURT: No. Here's the thing. Look, the opening statements of the attorney is to predict or project what the witnesses are going to say. There's no attorneys on the witness list, so we're not going to be hearing from any attorneys as to their opinion about Mr. Delosreyes'[s] mental state a year or two ago. Whatever was going on a year or two ago is not the issue. The issue is now, April 2012. Is the gentleman competent at this time to stand trial. [¶] So whether something developed recently or not is—or there's some foundation in the past to evaluate whether something is currently happening now is what we need to focus on, so we need to kind of get the older background over with a little more expeditiously.

"[THE PROSECUTOR]: Okay. Well, the whole point of all this is that his mental health needs to be evaluated in the totality. You look—they, the defense, brought up his mental health as a child. I'm covering that, and I'm going through jail to his present time, so please indulge me. [¶] And I apologize if this is not interesting, but I'm getting there, but I'd just like to show his—the change of his mental health once he's in jail."

Preliminarily, the Attorney General argues that appellant has forfeited this issue by not objecting to the challenged statement on the ground of prosecutorial misconduct. According to the Attorney General, appellant's objection was on the basis of relevancy. We do not share such a limited view of the record. While appellant initially objected on the grounds of relevancy with respect the prosecutor's reference to the preliminary hearing, he subsequently stated that the prosecutor's comments about his former attorney's belief in his competence was "[t]otally inappropriate."

Nevertheless, we conclude that it is not reasonably likely the jury misconstrued or misapplied the challenged comments. (See *People v. Cole*, *supra*, 33 Cal.4th at pp. 1202-1203; *People v. Pigage* (2003) 112 Cal.App.4th 1359, 1375 ["a timely admonition from the court generally cures any harm"]; see also *People v. Jones* (1997) 15 Cal.4th 119, 168, overruled on another point in *People v. Hill*, *supra*, 17 Cal.4th at p. 823, fn. 1 [when trial court sustains defense objections and admonishes jury to disregard comments, we assume jury followed admonition and that prejudice was therefore avoided]; *People v. Pinholster* (1992) 1 Cal.4th 865, 943, overruled on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459 [defendant suffered no prejudice when defense objection sustained, trial court directed that there be no further reference to subject matter, witness did not answer question, and jury instructed to disregard question].) The court expressly admonished counsel and the jury that the proper focus was whether appellant was *presently* competent to stand trial, explaining that "[w]hatever was going on a year or two ago is not the issue." Accordingly, to the extent any misconduct can be asserted regarding the prosecutor's comment during opening statement, it did not prejudice appellant.

3. Examination of Detective Schiro

Appellant next asserts that the prosecutor committed misconduct in questioning Detective Schiro. The challenged questioning is as follows:

"[PROSECUTOR]: Now, back on June 1st of 2010, did you testify at the preliminary hearing in this case?

"A. Yes. [¶] . . . [¶]

"[PROSECUTOR]: And at the preliminary hearing was Timmy Delosreyes, The Third, present?

"A. Yes.

"[DEFENSE COUNSEL]: Your Honor, I'm going to object to that as being totally irrelevant to the matters before this jury, his pretrial competence.

"THE COURT: Well, as to who was present at the hearing?

"[DEFENSE COUNSEL]: What's that got to do with anything?

"THE COURT: Well, I don't—I assume it's foundation to something. So some other people were present. What's the relevant question?

"[PROSECUTOR]: *At any time during the part when you were in court or when you were testifying, did you observe the defendant, Timmy Delosreyes, act out or unusual in any manner?*

"[DEFENSE COUNSEL]: Objection, there's no foundation.

"THE COURT: Yes. Sustained. Sustained.

"[PROSECUTOR]: May we approach, your Honor?

"THE COURT: No. No. The testimony is coming in for a limited purpose, but that isn't—the jury's going to figure it out, not—not this witness." (Italics added.)

According to appellant, the italicized portion of the prosecutor's question constituted misconduct by trying to make Detective Schiro "an expert witness on whether [appellant] had exhibited evidence of lack of competence at the preliminary examination and at other prior court hearings." Appellant, however, did not object below on this specific basis and he did not request a curative admonition. Such failures forfeit his claim on appeal. (See *People v. Hill, supra*, 17 Cal.4th at p. 820.) Nevertheless, addressing the merits of this claim, we conclude it fails. Contrary to appellant's assertion, the prosecutor did not ask Detective Schiro to opine as to appellant's competence. Rather, prosecutor's question merely asked a percipient witness for his direct observation of appellant. Accordingly we conclude, there is no basis for appellant's claim of misconduct. In any event, the trial court sustained counsel's objection, so appellant suffered no prejudice. (See *People v. Jones, supra*, 15 Cal.4th at p. 168; *People v. Pinholster, supra,* 1 Cal.4th at p. 943.)

4. Comments During Closing Argument

Finally, appellant complains of prosecutorial misconduct during closing argument. The challenged comments are as follows:

"[PROSECUTOR]: Okay. Competency. This is very basic stuff. It's very minimal standards here. There are people in jail who suffer from bipolar, schizophrenia, very, very serious mental issues.

"[DEFENSE COUNSEL]: Your Honor, objection. There's no evidence of that.

"THE COURT: Sustained. There's no evidence in this record of that.

"[PROSECUTOR]: Okay. Common sense. There's people who are defendants in criminal trials who are able to be competent despite mental health issues. [¶] There's people who are putting pleas of not guilty by reason of insanity, and they are still competent to be—

"[DEFENSE COUNSEL]: Your Honor, again, I don't want to interrupt counsel's argument, but that's not what the evidence—

"THE COURT: Sustained. We have to limit our remarks to the facts presented to the jury during this trial . . . [¶] . . . [¶]

"[PROSECUTOR]: The defendant struggled with the idea of what does the D.A. do? Who is the District Attorney? At one point he thought that I was his friend or along with him and the Judge was the bad guy. Now, being a D.A. I can't tell you how common it is that people don't know what a D.A. is. My kid—

"[DEFENSE COUNSEL]: Your Honor, this is not evidence.

"THE COURT: Sustained. You can't testify, Mr. Peck. Move on."

According to appellant, in both these instances, the prosecutor again tried to serve as his own witness. Appellant's failure to object below on this specific basis and his failure to request a curative admonition forfeits his claim on appeal. (See *People v. Hill, supra,* 17 Cal.4th at p. 820.) Regardless, as to both comments, the trial court sustained defense counsel's objection, and as to the first instance, the court immediately noted for the jury that there was no evidence in the record of the kind mentioned by the prosecutor.

Moreover, the trial court repeatedly advised the jury that it was to ignore evidence that was stricken from the record following a sustained objection. The court also expressly told the jury that it was to decide the case based only on the evidence presented and that argument of counsel was not evidence.

On this record, we conclude that it is not reasonably likely the jury misconstrued or misapplied the challenged comments. (See *People v. Cole, supra,* 33 Cal.4th at pp. 1202-1203; see also *People v. Jones, supra,* 15 Cal.4th at p. 168; *People v.*

Pinholster, supra, 1 Cal.4th at p. 943; *People v. Pigage, supra,* 112 Cal.App.4th at p. 1375.)

5. Cumulative Error

According to appellant, the cumulative effect of the prosecutor's questions/comments prejudiced him. However, we have either rejected appellant's claims of misconduct or have found any alleged misconduct to be nonprejudicial. We reach the same conclusion with respect to the cumulative effect of any alleged errors. (See *People v. Sapp, supra,* 31 Cal.4th at p. 316.)

C. Competency Standard

Appellant contends that California's standard for competence as embodied by section 1367 and CALCRIM No. 3451, fails to meet the standard articulated for federal purposes in *Dusky v. United States* (1960) 362 U.S. 402. In *Dusky*, the court stated that the test for assessing a defendant's competency to stand trial is " 'whether he had sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.' " (*Dusky, supra,* 362 U.S. at p. 402.) Consistent with CALCRIM No. 3451, the jury was instructed that a "defendant is mentally competent to stand trial if he can do all of the following: [¶] One, understand the nature and purpose of the criminal proceedings against him; two, assist in a rational manner [ ] in presenting his defense; and three, understand his own status and condition in the criminal proceedings."

Appellant maintains that a person who is able " 'to assist counsel in the conduct of the defense in a rational manner' " does not necessarily have " ' "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" ' " as required by *Dusky*. The California Supreme Court in *People v. Jablonski* (2006) 37 Cal.4th 774, 808, rejected this very argument. There, the court addressed a challenge to CALJIC No. 4.10, which mirrors CALCRIM No. 3451. In rejecting this challenge, the Court noted that it has "previously observed that the language of section 1367, from which CALJIC No. 4.10 is drawn, 'does not match, word for word, that of *Dusky*. But . . . "[t]o anyone but a hairsplitting semanticist, the two tests are identical." ' [Citations.]"

(*Jablonski, supra,* 37 Cal.4th at p. 808.) Indeed, as our high court noted, "the United States Supreme Court has itself used a formulation similar to California's to describe the standard of competency. (*Godinez v. Moran* (1993) 509 U.S. 389, 402 ['Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to *assist* counsel' (italics added)].)" (*Jablonski, supra,* 37 Cal.4th at p. 808.)

As appellant acknowledges, we are bound by the court's holding in *Jablonski*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, "[w]e reject [appellant's] claim that California's formulation of the competency standard fails to comport with federal due process requirements." (*Jablonski, supra,* 37 Cal.4th at p. 808.)[5]

D. Sufficiency of Evidence

Due process prohibits trying or convicting a defendant who is mentally incompetent. (*People v. Rogers* (2006) 39 Cal.4th 826, 846.) "A defendant is mentally incompetent . . . if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." (§ 1367, subd. (a).) "It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent." (§ 1369, subd. (f).)

On appeal, a finding on the issue of a defendant's competence to stand trial "cannot be disturbed if there is any substantial . . . evidence in the record to support the finding." (*People v. Castro* (2000) 78 Cal.App.4th 1402, 1418, overruled on another point in *People v. Leonard* (2007) 40 Cal.4th 1370, 1391, fn. 3.) "In reviewing a jury verdict that a defendant is mentally competent to stand trial, an appellate court must view the record in the light most favorable to the verdict and uphold the verdict if it is

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[5] Similarly, we are not persuaded by appellant's claim that the "problem with CALCRIM [No.] 3451" was "amply illuminated" by a question from jury requesting an example of "assisting."

supported by substantial evidence. [Citation.] Evidence is substantial if it is reasonable, credible, and of solid value. [Citations.]" (*People v. Marshall* (1997) 15 Cal.4th 1, 31.) "Substantial evidence includes circumstantial evidence and the reasonable inferences flowing therefrom." (*People v. Ugalino* (2009) 174 Cal.App.4th 1060, 1064.) "We 'must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]' [Citation]." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357-358.) "We must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence. [Citation.]" (*People v. Medina* (2009) 46 Cal.4th 913, 919.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict. [Citation.]" (*People v. Zamudio, supra*, 43 Cal.4th at p. 357.)

Appellant argues substantial evidence does not support the conclusion he was competent. To support his position, he advances three arguments. First, the prosecution expert examined appellant more than seven months before the trial and had "no basis" to render an opinion as to appellant's "present" competence to stand trial. Second, he contends that the defense expert presented more compelling evidence because that expert had examined appellant on more than one occasion, with the most recent one taking place one week before trial; the defense expert also opined that appellant showed less competency during the recent examination than in the prior examination. Third, he claims, with little explanation, this matter is the same as *People v. Samuel* (1981) 29 Cal.3d 489. We reject each contention.

The fact that the prosecution expert's examination occurred nearly nine months before trial does not establish a lack of substantial evidence to support the jury's finding of competence. While the jurors could certainly consider the amount of time that had passed since Dr. Griffith's evaluation, as the defense urged them to do, the jury plainly, and reasonably, rejected appellant's position that the evaluation was stale. "It is not the role of this court to redetermine the credibility of experts or to reweigh the relative strength of their conclusions." (*People v. Poe* (1999) 74 Cal.App.4th 826, 831.)

Similarly, that the defense expert opined that appellant was not competent does not prove a lack of substantial evidence to support the jury's finding. The jury was not under any obligation to adopt the defense expert's opinion. Such a requirement would undermine the jury's role, and in effect transform the competency decision into a trial by experts, rather than a trial by jury. (*People v. Samuel, supra,* 29 Cal.3d at p. 498.)

Finally, this matter is not analogous to *People v. Samuel, supra,* 29 Cal.3d 489. In *People v. Samuel*, our high court found the defendant produced an "impressive body of evidence" of his lack of competence to stand trial and noted the prosecution provided little, if any, evidence concerning the defendant's competence to stand trial. (*Id.* at p. 503.) The court therefore concluded substantial evidence did not support the jury's finding that the defendant was competent to stand trial. (*Id.* at p. 506.) Here, appellant did not produce an "impressive body of evidence." While Dr. Kincaid testified he believed appellant was not competent to stand trial, he acknowledged that appellant was at least competent at times or in some areas. Dr. Kincaid's conclusion that appellant was not competent was based in part on appellant's history of mental illness and appellant's hallucinations. When asked, however, whether there was any mention of appellant having hallucinations before he was charged with murder, Dr. Kincaid testified he could not answer the question. He also acknowledged that the evidence he had that appellant had been suffering from hallucinations came from appellant himself, and that the records he reviewed as to appellant's mental health history only covered appellant's childhood up to the age of about 12.

Moreover, unlike in *People v. Samuel,* the prosecution offered ample evidence to prove appellant was competent. Dr. Griffith testified he believed appellant was competent to stand trial. When he met with appellant in July 2011, appellant made direct eye contact with him, appellant's hygiene and grooming were adequate, and appellant's speech was clear, with a "normal rate, normal volume." Dr. Griffith also testified that appellant was not "giving information that was totally out of touch with reality. It was fairly straightforward with a clear understanding of . . . his intentions and his goals."

In addition to expert testimony, the prosecution presented through deputy sheriffs Michael Meth and Garrett Schiro evidence that appellant was malingering. Deputy Meth testified that during his interview with appellant on December 30, 2009, appellant first told the deputy he did not know who had killed Eric, but added that Eric "had burned some people." Later in the interview, appellant proffered two names as possible suspects; then, while Deputy Meth asked appellant follow-up questions, appellant complained of chest pains and indicated he was having trouble breathing, prompting the deputy to call an ambulance to take appellant to the hospital. According to Deputy Meth, during his meeting with appellant, their conversation was normal, and he had no trouble understanding appellant.

Sergeant Schiro met with appellant on March 6, 2010, and after advising appellant of his *Miranda* rights, appellant acknowledged he understood them. After just a few minutes of talking to Sergeant Schiro, appellant asked to use the restroom; when he returned to the interview room he told the officer he had accidentally swallowed the cap on a plastic water bottle, but was okay to continue the interview. Shortly thereafter, appellant indicated, however, that the cap was bothering him, so an ambulance was called to take appellant to the hospital. Later that day, when police continued the interview at the hospital, appellant was shown a video of codefendant Robert Gardner, to which appellant responded, " 'He's a liar. He's setting me up [.]' " When told that the crime laboratory had found Eric's blood in appellant's bedroom, appellant indicated he was not involved in Eric's death, that he was not "capable of doing something like that." He also told police that both he and Eric were "methed out." After being shown the video of Gardner a second time, appellant admitted that Eric Bean "was dead in his bedroom[,]" but denied being involved in Eric's death—that Eric was dead " 'when he found him[.]' " Appellant also admitted putting Eric in a truck and dumping his body on the side of the road.

During appellant's March 8, 2010, interview with Sergeant Schiro, appellant again acknowledged understanding his *Miranda* rights. Upon seeing a video of his father, appellant said, "he's lying[,]" and protested that "he was too young to go down for this."

During that same interview, appellant asked police if he was being recorded; right after they said, yes, appellant "immediately . . . started becoming emotional." When police asked appellant if his DNA would be found on Eric's body, appellant told them "it would be because he placed Eric's dead body in the truck or something to that effect." He also admitted that his DNA would be found on rope or tape he had removed from Eric's body after he was dead. Towards the end of that interview, appellant admitted to hitting Eric prior to his death, and "scooting" him with his foot; when asked if he had participated in Eric's killing, appellant responded, " 'Yes. Yes, I guess I did. I didn't want him to die.' "

During his interactions with the police, appellant indicated he understood his rights and he not only responded appropriately to the questions posed by the deputies; he understood the legal ramifications of the evidence with which he was presented. Appellant understood that statements made by his father and Robert Gardner to police could result in him "going down" for Eric's murder, and that his DNA would be found on Eric's body because he handled the body by placing it in a truck and then dumping it on the road. Appellant also displayed evasive behavior during his interviews with police. For example, during the first two interviews, when police began to question him in detail about Eric Bean's killing, appellant avoided their questions by indicating he was sick and needed medical attention. Then, during the last interview, after being told he was being recorded, appellant immediately became emotional for the camera, which could reasonably be understood as an attempt to show remorse and curry favor with police and the ultimate trier of fact.

The prosecution also presented evidence regarding appellant's conduct in jail. Between May 2010, and February 23, 2012, or less than two months before the competency trial, appellant consistently submitted requests for information and medical attention, which included detailed descriptions of his physical ailments and any problems he was having. He was able to logically and rationally convey his thoughts in an attempt to meet his needs, thus supporting the jury's conclusion that he could assist his attorney in his own defense. Even, assuming arguendo, appellant was assisted with these requests

by other inmates, the fact remains that he was able to ask for help and was also able to follow through to meet his needs.

In summary, we are satisfied substantial evidence supports the jury's finding of competence. Appellant's conduct in his interview with Dr. Griffith, together with his answers to the officers' questions, plus his behavior in jail indicated he had sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and he had a rational as well as factual understanding of the proceedings against him.

E. Cumulative Error

Appellant contends that the cumulative effect of errors at his competency trial requires reversal. However, because we have either rejected on the merits his claims of error or have found any assumed errors to be nonprejudicial we reach the same conclusion with respect to appellant's claim of cumulative error. (See *People v. Jablonski, supra,* 37 Cal.4th at p. 810; *People v. Sapp, supra,* 31 Cal.4th at p. 316.)

IV. GUILT PHASE ISSUES

A. Alleged Instructional Error on Involuntary Intoxication

Appellant contends that the trial court committed prejudicial error in instructing the jury on voluntary intoxication as applied to the torture and torture-murder counts. Specifically, appellant claims that the court erred in limiting the jury's ability to consider his intoxication in deciding whether he had the specific intent required to commit torture and torture-murder.

1. Background

The trial court instructed the jury on appellant's guilt both as a direct perpetrator and as an aider and abettor for: 1) first degree murder (premeditated or torture); 2) felony-murder; and 3) torture.

At appellant's request, the trial court gave two jury instructions on voluntary intoxication. With a modified version of CALCRIM No. 404, the trial court instructed the jury as follows: "If you conclude that the defendant was intoxicated at the time of an alleged crime, you may consider this evidence in deciding whether the defendant: [¶]

A.) Knew that a perpetrator intended to commit murder, torture, attempted torture, false imprisonment by violence and menace or witness intimidation, and; [¶]

B.) Intended to aid and abet a perpetrator in committing murder, torture, attempted torture, false imprisonment by violence and menace or witness intimidation.

Someone is *intoxicated* if he or she used any drug, drink, or other substance that caused an intoxicating effect.

Do not consider evidence of intoxication in deciding whether murder is a natural and probable consequence of torture, attempted torture, false imprisonment by violence and menace or witness intimidation." The written version of the instruction provided to the jury included the following heading: "404. Aiding and Abetting: Intoxication[.]"

With a modified version of CALCRIM No. 625, the trial court also instructed the jury as follows: "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence in deciding whether the defendant acted with an intent to kill, or the defendant acted with deliberation and premeditation. [¶] A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. [¶] You may not consider evidence of voluntary intoxication for any other purpose, except as directed by the court in [i]nstruction #404." The written version the instruction given to the jury included the following heading: "625. Voluntary Intoxication: Effects on Homicide Crimes (Pen. Code, § 22)[.]"

On appeal, appellant asserts that the instructions as given erroneously prevented the jury from considering whether he had the specific intent required to commit torture-murder as either a direct perpetrator or an aider and abettor and whether he had the specific intent to commit torture as a direct perpetrator. Based on the record before us, we conclude that there was no prejudicial error.

2. Applicable Law

In a criminal case, a trial court must instruct the jury on general principles of law relevant to the issues raised by the evidence even in the absence of a request for such

instruction. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) In contrast, a defendant is entitled to an instruction that pinpoints his or her theory of the case only upon request. (*People v. Ledesma* (2006) 39 Cal.4th 641, 720; *People v. Saille* (1991) 54 Cal.3d 1103, 1119.) "[A]n instruction on voluntary intoxication, explaining how evidence of a defendant's voluntary intoxication affects the determination whether defendant had the mental state required for the offenses charged, is a form of pinpoint instruction that the trial court is not required to give in the absence of a request. [Citation.]" (*People v. Bolden* (2002) 29 Cal.4th 515, 559; see *People v. Verdugo* (2010) 50 Cal.4th 263, 295 ["It is well settled that '[a]n instruction on the significance of voluntary intoxication is a "pinpoint" instruction that the trial court is not required to give unless requested by the defendant' "].) Additionally, "[a] defendant is entitled to such an instruction only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's 'actual formation of specific intent.' [Citations.]" (*People v. Williams* (1997) 16 Cal.4th 635, 677.)

As a preliminary matter, the Attorney General argues that appellant has forfeited his claim of instructional error on appeal by failing to object to the voluntary intoxication instructions that were given or to request a clarifying or amplifying instruction in the trial court. Nevertheless, we proceed to the merits and conclude that appellant's claim of prejudicial error fails.

The applicable legal standards are settled. As our Supreme Court has recognized, "[a]lthough a trial court has no sua sponte duty to give a 'pinpoint' instruction on the relevance of evidence of voluntary intoxication, 'when it does choose to instruct, it must do so correctly.' " (*People v. Pearson* (2012) 53 Cal.4th 306, 325, citing *People v. Castillo* (1997) 16 Cal.4th 1009, 1015.) Where, as here, a defendant claims that instructional error precluded the jury from properly considering evidence of his or her voluntary intoxication, "[t]he appellate court should review the instructions as a whole to determine whether it is 'reasonably likely the jury misconstrued the instructions as precluding it from considering' the intoxication evidence . . . . [Citation.]" (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1134.) Any error in instructing the jury on voluntary

intoxication "would have the effect of excluding defense evidence and is thus subject to the usual standard for state law error: 'the court must reverse only if it also finds a reasonable probability the error affected the verdict adversely to defendant.' [Citation.]" (*Id.* at pp. 1134-1135; see *People v. Pearson, supra,* 53 Cal.4th at p. 325 [appellate courts "apply the 'reasonable probability' test of prejudice to the [trial] court's failure to give a legally correct pinpoint instruction" on voluntary intoxication].)

3. Analysis

Appellant argues that the court prejudicially erred in its voluntary intoxication instructions because the issue of "torture" dominated the prosecution's case. As discussed, CALCRIM No. 404 instructed the jury that it could consider evidence of voluntary intoxication in determining whether appellant had the mental state required to aid and abet the commission of murder and torture, but did not make any reference to torture-murder. And, CALCRIM No. 625 instructed the jury that it could only consider evidence of appellant's voluntary intoxication in determining whether he had the requisite specific intent as a direct perpetrator of an intentional homicide.

Appellant argues the erroneous instructions deprived him of his constitutional rights to due process and to present a defense. But "[t]he failure to give a fully inclusive pinpoint instruction on voluntary intoxication did not, contrary to [appellant's] contention, deprive him of his federal fair right to trial or unconstitutionally lessen the prosecution's burden of proof. (See *People v. Saille* (1991) 54 Cal.3d 1103, 1117–1120 [voluntary intoxication as negating specific intent sets out neither a defense nor a general principle of law on which instruction must be given sua sponte].)" (*People v. Pearson, supra,* 53 Cal.4th at p. 325, fn. 9.)

Furthermore, we need not decide whether the trial court's instructions were misleading or inadequate because even if we assume there was instructional error, it is not reasonably probable that different instructions would have resulted in a verdict more favorable to appellant. There was compelling evidence that appellant's intoxication did not appreciably affect his mental state in the commission of the crimes. Indeed, the evidence at trial overwhelmingly supported a finding that appellant was in full command

of his senses when he tortured and killed Eric Bean, and then dumped his body on the side of the road.

Although evidence was presented that appellant had gotten high the week of the murder and may have even been "methed out" on the day of the murder, no evidence was presented regarding the effects of the alleged intoxication on appellant's mental state.

For example, appellant was physically able to bind Eric's ankles and wrists. Later that day, he engaged in a coherent discussion with codefendant Gardner about their options with respect to Eric, and responded to Gardner's orders to get tape and rope to further tie Eric so he could not escape. He also had the strength and dexterity to punch Eric so hard that his fist hurt as a result. Later that day, appellant was coordinated enough to stick a sword or dagger down Eric's throat and twist it until Eric "gurgled." Then, appellant was able to help carry and load Eric's dead body into a truck, and go out to a county road where he unloaded the body and dumped it on the road. Later, when he returned home, he had the foresight and ability to clean traces of the torture and murder from his bedroom with bleach, and to remove the telephone book that had covered Eric's face and had the sense to ask Melody Rives to burn it to destroy any connection to the killing.

Given this evidence, it is not reasonably probable appellant's verdict would have been more favorable had the trial court instructed the jury it could consider appellant's voluntary intoxication as to the intent element of torture. (See e.g., *People v. Frierson* (1979) 25 Cal.3d 142, 156-157 ["in the absence of evidence regarding the amount of drugs ingested by defendant and their effect upon his mental state, no reasonable juror would have concluded that defendant lacked a specific intent to commit robbery"]; *People v. Carr* (1972) 8 Cal.3d 287, 295 ["in the absence of evidence indicating the quantity of marijuana consumed or additional evidence reflecting the state of defendant's mind, a jury could not reasonably have concluded, in the light of the evidence in this case, that defendant by reason of intoxication did not premeditate or adequately deliberate"]; see also *People v. Pearson, supra,* 53 Cal.4th at p. 325, fn. 9 ["[t]he failure to give a fully inclusive pinpoint instruction on voluntary intoxication did not . . . deprive

[defendant] of his federal fair trial right or unconstitutionally lessen the prosecution's burden of proof"] *People v. Mendoza, supra,* 18 Cal.4th 1114, 1134-1135 [any error in jury instruction on voluntary intoxication "would have the effect of excluding defense evidence and is thus subject to the usual standard for state law error: 'the court must reverses only if it also finds a reasonable probability the error affected the verdict adversely to defendant.' [Citation.]"])

B. Venue for Torture Charge

Appellant argues that the trial court erred by denying his motion for judgment of acquittal (§ 1181.1) of the torture charge based on improper venue. According to appellant, Contra Costa County was an improper venue for the torture charge because the acts of torture occurred in Solano County.

Venue is a question of law governed by statute. (*People v. Thomas* (2012) 53 Cal.4th 1276, 1282.) In general, the proper venue for the prosecution of a criminal offense is in the superior court of the county where the crime was committed.[6] (§ 777 ["[E]xcept as otherwise provided by law the jurisdiction of every public offense is in any competent court within the jurisdictional territory of which it is committed"].) An exception to the basic venue rule is found in section 781, which provides: : "When a public offense is committed in part in one jurisdictional territory and in part in another jurisdictional territory, *or the acts or effects thereof constituting or requisite to the consummation of the offense* occur in two or more jurisdictional territories, the jurisdiction for the offense is in any competent court within either jurisdictional territory." (Italics added.) Section 781 "was intended to broaden criminal jurisdiction beyond the rigid limits fixed by the common law in cases of crimes committed in more than one jurisdiction." (*People v. Powell* (1967) 67 Cal.2d 32, 63.) The section is remedial and we construe it liberally, interpreting " ' "in a commonsense manner with proper regard for the facts and circumstances of the case rather than technical niceties." '

[6] Venue for a homicide charge is proper "in the county where the fatal injury was inflicted or the county in which the injured party died or the county in which his or her body was found." (§ 790, subd. (a).)

[Citation.]" (*People v. Thomas, supra,* 53 Cal.4th at p. 1283.) The prosecutor bears the burden of establishing the facts supporting venue by a preponderance of the evidence. (*Id.* at p. 1283.) We review the trial court's determination regarding venue for evidentiary support. (*Ibid.*; *People v. Chavarria* (2013) 213 Cal.App.4th 1364, 1369.) A trial court's venue determination will be upheld so long as there is " ' "some evidence" ' " to support its decision. (*People v. Thomas, supra,* 53 Cal.4th at p. 1283.)

Several decisions interpreting section 781 have found proper venue in a county where "only preparatory acts have occurred" and where those preparatory acts were not themselves elements of the offense. (*People v. Simon* (2001) 25 Cal.4th at 1082, 1109.) One example is *People v. Carrington* (2009) 47 Cal.4th 145, in which our Supreme Court held that San Mateo County was a proper venue in which to prosecute the defendant for a murder that occurred in Palo Alto, which is located in Santa Clara County. There, the defendant, while in San Mateo County, arranged for a ride to Palo Alto, took a bag from her San Mateo County home containing items to be used in a planned burglary in Palo Alto, she murdered the victim during the Palo Alto burglary, and then brought the proceeds of the burglary home to San Mateo. (*People v. Carrington, supra,* 47 Cal.4th at p. 184; see *People v. Price* (1991) 1 Cal.4th 324, 385-386 [defendant could be prosecuted in Humboldt County for murder in Los Angeles County where defendant stole firearms and committed other acts in Humboldt County in preparation for murder].)

In addition to preparatory acts, the California Supreme Court has also held that venue can be based on the *effects* of preparatory acts (what it has called " 'preparatory effects' "). (*People v. Thomas, supra,* 53 Cal.4th at p. 1285.) For example our high court has explained that "a defendant who commits a crime in one county with effects in another county that are 'requisite to . . . the achievement of the [defendant's] unlawful purpose' may be tried in the latter county under section 781, even though the effects were not elements of the offense. (*People v. Megladdery* (1940) 40 Cal.App.2d 748, 775 (*Megladdery*), disapproved on other grounds in *People v. Simon, supra,* 25 Cal.4th 1082[, 1108].) The defendant in *Megladdery* was convicted in Alameda County of soliciting an individual to bribe the Governor, even though the solicitation occurred in San Francisco.

Referring to section 781's phrase 'or the acts or effects thereof constituting or requisite to the consummation of the offense,' the court said: 'By the use of the word "consummation" the [L]egislature drew a distinction between an act or an effect thereof which is essential to the commission of an offense, and an act or effect thereof which, although unessential to the commission of the offense, is requisite to the completion of the offense—that is, to the achievement of the unlawful purpose of the person committing the offense.' (*Megladdery, supra,* 40 Cal.App.2d at p. 775.)" (*People v. Thomas, supra,* 53 Cal.4th at pp. 1285-1286; see also *People v. Graves* (1934) 137 Cal.App. 1, 19 [prosecution proper in Los Angeles for bribe paid in San Francisco where vote or effect of bribe occurred in Los Angeles]; *People v. Keller* (1926) 79 Cal.App. 612, 616-617 [venue proper in county defendant never entered where he wrote an unauthorized check from employer's account located in forum county]; *People v. Boggess* (1924) 194 Cal. 212, 218-220 [venue proper in Sacramento because false application transmitted from San Francisco was filed in Sacramento]; *People v. Grubb* (1914) 24 Cal.App. 604, 607-609 [defendant properly prosecuted in San Francisco for recruiting a prostitute from Los Angeles to work in San Francisco].) In other words, "the phrase 'requisite to the consummation of the offense' . . . mean[s] requisite to achieving the offender's unlawful purpose." (*People v. Bismillah* (1989) 208 Cal.App.3d 80, 85.)

Appellant argues that the instant case is distinguishable from cases finding venue based on preparatory effects. He contends that in all of these cases, the crimes had their " 'effects' " in the forum county—i.e. a bad check would be paid in the forum county; a fraudulent filing would take effect in the forum county; a prostitute would work in the forum county. According to appellant, "[i]f there was torture, it and its effects all occurred in Solano County." We disagree. By this argument, appellant erroneously limits the scope and purpose of section 781.

Under section 781, a public offense may be tried in a jurisdiction in which the defendant made preparations for the crime, even though the preparatory acts did not constitute an essential element of the crime. (*People v. Price, supra,* 1 Cal.4th 324, 385, superseded by statute on other grounds as stated in *People v. Hinks* (1997) 58

Cal.App.4th 1157, 1161-1165.) We have no difficulty concluding that venue was proper in Contra Costa County because appellant participated in the burglary and gun theft in that county, the criminal acts from which the acts of torture and murder flowed. The prosecution presented evidence that appellant and his codefendants were concerned that Eric was going to "tell" about the theft and that they tortured and murdered him to prevent him from implicating them. Appellant then dumped Eric's body in Contra Costa County. But for the burglary and gun theft, there would have been no reason for the torture and murder to occur. Because "this constitutes some evidence sufficient to support the finding that preparatory acts or effects requisite to commission of appellant's crimes took place in [Contra Costa] County, his motion to dismiss for lack of proper venue in that county was properly denied." (*People v. Chavarria, supra,* 213 Cal.App.4th 1364, 1371 [venue proper in county where customer was located during telephone call in which drug sale negotiated: "But for that call, there could have been no sale"].)

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant next claims that in the event that we find that any alleged errors were forfeited by counsel's failure to object on the relevant basis, counsel rendered ineffective assistance of counsel.

An ineffective assistance of counsel claim has two prongs. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) First, the defendant "must show that counsel's representation fell below an objective standard of reasonableness." (*Id.* at p. 688.) "Second, the defendant must show that the deficient performance prejudiced the defense. . . . [and] deprive[d] the defendant of a fair trial. . . ." (*Id.* at p. 687.)

We need not engage in a lengthy analysis of this issue, as we have addressed all of appellant's arguments on the merits, and have concluded that he did not suffer any prejudice either in the competency or guilt phase. Consequently, any complained of shortcomings of trial counsel did not constitute ineffective assistance of counsel. (*Strickland v. Washington, supra,* 466 U.S. at p. 687, 697 ["a court need not determine

whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies"].)

VI. SENTENCING

Finally, appellant argues that he should not have received concurrent sentences for the offenses of murder and torture, but rather the sentence for torture should have been stayed under section 654.

Section 654 precludes multiple punishments for a single act or indivisible course of conduct punishable under more than one criminal statute. Whether a course of conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the "intent and objective" of the actor. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19, disapproved on other grounds in *People v. Correa* (2012) 54 Cal.4th 331, 341.) If all of the offenses are incident to one objective, the court may punish the defendant for any one of the offenses, but not more than one. (*People v. Perez* (1979) 23 Cal.3d 545, 551.) If, however, the defendant had multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct. (*People v. Beamon* (1973) 8 Cal.3d 625, 639.)

"[T]he protection against multiple punishment is to insure that the defendant's punishment will be commensurate with his criminal liability." (*Neal v. State of California, supra,* 55 Cal.2d at p. 20.) We review the court's determination of a defendant's separate intents for sufficient evidence in a light most favorable to the judgment, and presume in support of the court's findings the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730; *People v. Green* (1996) 50 Cal.App.4th 1076, 1085.)

Appellant argues that his sentence on the torture count should have been stayed because torture was the method used to commit the murder. There was sufficient evidence for the court to conclude appellant harbored divisible intents in committing separate crimes. This is not a case where one volitional act gave rise to multiple offenses.

Rather, the record shows that appellant and Gardner tied up Eric, in part, to scare him not tell anyone about the gun theft and to prevent him from leaving the house. It was only after the beatings had gone on for several hours, did codefendant Gardner, say " 'We can't let him go now because now we'll get in trouble for kidnapping.' "

The record makes clear that while torturing Eric, appellant and Gardner had time to reflect on whether they would let him go; they decided instead to kill him so as to leave no witnesses to their crimes of burglary and gun theft. Under these facts, section 654 does not apply. (See e.g., *People v. Harrison* (1989) 48 Cal.3d 321, 326, 335-336 [section 654 did not apply where defendant committed three acts of vaginal penetration during span of seven to 10 minutes; each time initial attack was interrupted by victim's struggle, defendant voluntarily resumed sexually assaultive behavior]; *People v. Surdi* (1995) 35 Cal.App.4th 685, 688-690 [defendant argued section 654 prohibited court from sentencing him for both kidnapping and mayhem where kidnapping was for sole purpose of beating victim, which encompassed mayhem count; court held that because offenses did not arise from single volitional act, but were separated by periods of time during which defendant had opportunity to reflect, defendant properly punished for both kidnapping and mayhem]; *People v. Trotter* (1992) 7 Cal.App.4th 363, 367-368 [section 654 did not apply where defendant had time to reflect between shots he fired at police officer and his renewed intent to harm the officer].)

Because the facts here support a conclusion that appellant entertained the distinct objectives of killing Eric Bean and causing him to suffer cruel or extreme pain; the trial court's decision not to stay the torture sentence is supported by substantial evidence.

VII. DISPOSITION

The judgment is affirmed.

_____
REARDON,. ACTING P. J.

We concur:

_____
RIVERA, J.

_____
STREETER, J.